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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 2000

JOHN H. WEHBY, M.D.
Petitioner

v.

ANTHONY WARD, ET AL.
Respondents

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the notice requirements embodied in the due process clause of the Fourteenth Amendment can be satisfied by attempting service at a defendant's former office address, which defendant continues to maintain simply as a storage facility, when, though the local telephone book continues to list the defendant at that address, defendant is in fact only rarely present at the address, and plaintiff has knowledge of defendant's residence address and counsel for plaintiff has means by which the defendant's residence address can easily be ascertained.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The petitioner in this case is an individual physician who formerly practiced medicine in Cincinnati, Ohio. Respondents are a former patient of the petitioner and the petitioner's wife.

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PETITION FOR WRIT OF CERTIORARI

John H. Wehby, M.D., respectfully petitions for a writ of certiorari to review the decision of the Supreme Court of Ohio declining to review the decision of the Court of Appeals, First Appellate District of Ohio.

OPINIONS BELOW

The entry in the Supreme Court of Ohio by which it declined jurisdiction to hear the case and to dismiss the appeal is contained in the appendix. That decision was made without a published opinion. The judgment entry of the Court of Appeals, First Appellate District of Ohio, Hamilton County, Ohio is also contained in the appendix (Appendix A). That decision was likewise made without published opinion.

JURISDICTION

The judgment of the court of appeals was entered August 2, 2000 and a timely notice of appeal and memorandum in support of jurisdiction were declined by the Supreme Court of Ohio December 6, 2000 (Appendix B).

RULE INVOLVED

Pertinent provisions of Ohio Rule of Civil Procedure 60(B) are set forth in the appendix (Appendix C). In addition, this matter concerns the due process clause of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT

Dr. John H. Wehby has been licensed to practice medicine since 1977. In 1984 he purchased a home in Hamilton County, Ohio and has been the owner of that property as listed on the deed and as recorded with the Hamilton County Auditor since that time. He has continuously resided at that residence from the time of its

purchase in 1984 through the present.

In 1992 or 1993, Dr. Wehby opened an office for practice of medicine at 7836 Beechmont Avenue, in Cincinnati, Ohio. He practiced medicine there until retiring from the active practice of medicine in June of 1997. At various times between opening his practice in 1992 or 1993 and retiring from practice in June of 1997, he treated respondent Anthony Ward at the Beechmont Avenue address. During that time, Dr. Wehby on occasion asked Mr. Ward to arrange to deliver various things to Dr. Wehby's home and for that reason advised Mr. Ward of Dr. Wehby's residence address. In fact, Mr. Ward did arrange to have deliveries made to Dr. Wehby's residence address during that time period.

After June of 1997, Dr. Wehby ceased the active practice of medicine and thereafter utilized his former office space, which was still under lease, for storage of his many antiques and other collectibles. He went to the former office premises sporadically and on rare occasions.

On October 29, 1997, counsel for respondent Ward wrote Dr. Wehby at his former office address on Beechmont Avenue requesting a copy of his record of treatment of Mr. Ward. Counsel received no response. On January 14, 1998, counsel for Mr. Ward again wrote Dr. Wehby at his former office address. Again there was no response. On March 17, 1998, a complaint for discovery was filed on behalf of respondents against Dr. Wehby pursuant to Ohio Revised Code Section 2317.48. On March 20, 1998, process was attempted to be served on Dr. Wehby at his former office address by certified mail. The attempted service of process was returned unclaimed. On May 1, 1998, a complaint for medical malpractice and loss of consortium was filed on behalf of respondents. Summons was issued via certified mail May 1, 1998, again seeking service at Dr. Wehby's former office address. The certified mail receipt was returned unclaimed. On October 1, 1998, counsel for respondents filed a written request for regular mail service and on October 6, 1998, a certificate of regular mail was filed with the clerk's office. The request directed the clerk to

send the summons and complaint to Dr. Wehby's former office address.

Subsequent to June of 1997, Dr. Wehby did not regularly collect mail from the Beechmont Avenue address and was seldom physically present there. He did not receive any of the attempted correspondence from counsel for respondents, nor any summons sought to be served upon him. Dr. Wehby was unaware of the actions which the respondents had attempted to commence against him until he was notified by his neighbor in June of 1999 that in fact a judgment had been entered against him. Within days thereafter Dr. Wehby had secured counsel and had caused a motion to vacate judgment or for relief from judgment pursuant to Ohio Civil Rule 60(B)(5) to be filed.

The motion sought relief from the trial court's entry of judgment on May 27, 1999. The trial court had adopted a magistrate's decision on the motion for default judgment which had been filed on November 25, 1998, asserting that the regular mail service of process attempted October 2, 1998 at Dr. Wehby's former office address gave the trial court jurisdiction to enter judgment.

A hearing was held before the magistrate on petitioner's motion to vacate judgment or for relief from judgment. The magistrate issued its decision September 8, 1999, denying the motion. On September 15, 1999, petitioner filed objections to the magistrate's decision and a motion to reopen the hearing to admit additional evidence. Respondent filed a memorandum in opposition to appellant's request to reopen the hearing and to the objections to the magistrate's decision. On November 4, 1999, without opinion, the trial court adopted the magistrate's decision and overruled appellant's objections and motion to reopen.

Petitioner timely commenced an appeal in the Court of Appeals, First Appellate District of Ohio, Hamilton County, Ohio. The court of appeals held that the fact petitioner had actually stopped practicing medicine at the Beechmont Avenue office did

not deprive the trial court of jurisdiction. The court further held that Dr. Wehby's intermittent presence did not preclude ordinary mail service from being reasonably calculated to notify him of the pending complaint. Finally, the court further held that the respondents were not required to seek service of process at Dr. Wehby's residence address, even if they were aware of his residence address, so long as the method of service they chose was reasonably calculated to apprise Wehby of the action. The court of appeals found that respondents could have "reasonably anticipated" Wehby would be notified of the pending actions because signs continued to be maintained outside Dr. Wehby's former office address identifying it as his office, and that telephone listings for his medical practice continued to be listed in the telephone directory.

A timely appeal to the Ohio Supreme Court was sought. By its entry of December 6, 2000, the Ohio Supreme Court declined to exercise discretional jurisdiction.

While service of process at other than a defendant's residence address may satisfy the notice requirements of the due process clause in certain circumstances, the constitutional validity of such service depends on whether it is reasonably certain to inform the defendant, or that the method chosen for service is not substantially less likely to bring home notice than other of the feasible and customary substitutes. Mullane v. Central Hanover Bank & Trust Co., 339 U.S.306 (1950). In this instance, the conditions and circumstances were such that service of process at the petitioner's former business address, at which he no longer maintained an office, but utilized the premises solely for storage purposes, was certainly substantially less likely to give Wehby notice of the action against him than service at his residence address. The latter was certainly feasible. Plaintiff himself was aware of Wehby's residence address and had arranged for deliveries to be made there. Furthermore, respondents' counsel had in their employ, at the time service was attempted, an investigator who testified it would have been an easy matter for him to determine Wehby's residence address as he had been a long

time homeowner in Hamilton County, Ohio, as reflected in the auditor's records.

Furthermore, the state court's decision conflicts with that of the United States Court of Appeals for the Fifth Circuit, in the matter of Faden v. Insurance Company of North America, 96 F.3d 792 (1996). There the court of appeals found that mailing notice to an address listed in the current telephone book was not reasonably calculated to notify a defendant of the proceeding against him where the plaintiff could easily have referenced his own information to find the defendant's address. The court held in that case, which involved a bankruptcy proceeding, that although the bankrupt is not required to exhaust every possible avenue of information in ascertaining a creditor's address, he must exercise reasonable diligence in accurately scheduling his debts.

In this instance, respondents had ample reason to suspect Dr. Wehby would not receive notice of the action pending against him at what had been his business address. Respondents had caused correspondence to be mailed to Dr. Wehby at that address on multiple occasions and had received no response. In addition, respondents had caused certified mail service to be attempted at that address in two different actions on two separate occasions, and in each the certified mail receipt was returned unclaimed. Despite that, and despite respondent himself having been informed of the petitioner's residence address, and despite the fact counsel for respondent had in their employ an investigator who could readily and easily have ascertained petitioner's residence address, they instead caused ordinary mail service to be attempted at the former business address. It was upon that ordinary mail service that the default judgment was entered. Under those circumstances, simply checking the telephone book did not constitute reasonable diligence and service of process at petitioner's former business address did not satisfy the notice requirements of the due process clause.

REASONS FOR GRANTING THE PETITION

In today's economy businesses open and close and change locations not infrequently. Once issued, telephone directories are not corrected in timely fashion. Allowing service of process at an address at which a defendant no longer maintains a business, because the address continues to be listed in a telephone directory, flies in the face of the notice requirements of the due process clause. The Ohio court's decision that because the petitioner's address continued to be listed in the telephone directory and plaintiff had not been informed Dr. Wehby had retired were circumstances which made service at the former business address one "reasonably anticipated" to give Wehby notice when the petitioner's residence address was known to respondents and was easily ascertainable by respondents' counsel conflicts with the Fifth Circuit Court of Appeals Decision in Faden v. Insurance Company of North America, supra.

Permitting service of process in such circumstances would permit the notice required by the due process clause to be flouted even though valid addresses for defendants are known or easily ascertainable.

Furthermore, the Ohio Court's decision distorts Rule 60(B)(5) and reduces judgments based upon methods of service of process which do not meet constitutional muster to voidable, as opposed to void. In this case, while the petitioner sought relief from the default judgment entered against him pursuant to Ohio Civil Rule 60(B)(5) on the ground the judgment against him was void because service of process did not satisfy the due process requirements for notice, the decision to deny relief from the judgment was based upon the failure of petitioner to present evidence he had a meritorious defense to the claims against him, as would be required under Civil Rule 60(B)(1) for voidable judgments. While believing he had meritorious defenses to the claims against him, petitioner did not present evidence of those defenses because it is not required when seeking relief from a void judgment. After the magistrate rendered his opinion, the petitioner

sought leave to reopen the hearing to present evidence of his meritorious defenses but was denied.

Accordingly, allowing the State Court decision to stand would expose defendants and their property to judgments in actions in which they are unaware of the proceedings against them because service is not attempted at an address at which the defendant is most likely to receive notice, despite the fact that address is known or easily ascertainable by those making claims against them.

In these circumstances, the decision below, which upholds a $600,000 judgment against petitioner, when petitioner has meritorious defenses to the claims against him, should not stand.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted.



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